United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 12 1957
Joseph W. Stewart
CLERK.

No. 362

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Office - Supreme Court, U.S.
FILED
AUG 12 1957
JOHN T. FEY, Clerk

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL.,
Appellants,

v.

VIOLA A. HODSON, ET AL., *Appellees.*

PETITION FOR REHEARING

The appellants respectfully petition the court to order that the above-entitled appeal be reheard, and as grounds therefor say:

1. It is not factually correct for this court to state that the substance of the affidavits of the two (2) doctors was repeated in the lunacy petition signed and filed by the defendant-appellee Hodson, and it is not correct to state that the affidavits would have added nothing to the record as admissions by Mrs. Hodson against her interest. The allegations of the petition were as follows:

> "5. Petitioner states that the mental condition of respondent has progressively worsened since her retirement from United States Government Service in July, 1953. She is unable to care for her person. She is confused and imagines that she is in San Francisco. Petitioner believes that respondent is incapable of

managing her own affairs and is not fit to be at large, or to go unrestrained and, if permitted to remain at large, the rights of persons and property will be jeopardized and, further, that respondent is a fit subject for treatment because of her mental condition." (Appellants' App. 24)

The affidavit of Dr. Neil P. Campbell contains the following statements:

"* * * that he is a citizen of the United States and a resident of the District of Columbia, residing at 1409 Newton Avenue, N. W.; that he is a physician and has Dorothy Smallwood Geare under his care and treatment at the present time; that he has observed Mrs. Geare for some months and found that her mental condition has progressively worsened; that her mental condition has deteriorated markedly since her retirement from Government employment last year; that she is disorientated and confused; that she is incontinent and has elevation of blood pressure; that she suffers from Cerebral Arteriosclerosis. It is my opinion that Dorothy Smallwood Geare is of unsound mind, incapable of managing her own affairs and not fit to be at large or to go unrestrained and, if permitted to remain at liberty, the rights of persons and property will be jeopardized; it is my opinion that Mrs. Geare is a fit subject for treatment because of her mental condition." (Appellants' App. 26)

A comparison of the foregoing discloses that the petition itself, which was before the court and jury, did not disclose (1) that Mrs. Geare had been under the care and treatment of a physician for some months or (2) that her physician had found (a) that her mental condition had progressively worsened, (b) that her mental condition had deteriorated markedly since her retirement from Government employment in July, 1953, (c) that she was disoriented and confused, (d) that she was incontinent and (e) had elevated blood pressure and (f) that she suffered from cerebral arteriosclerosis. These findings by Dr. Campbell did not appear in the petition. Furthermore, the

petition did not contain the opinion of Dr. Campbell that Mrs. Geare was of unsound mind, incapable of managing her own affairs and not fit to be at large or to go unrestrained and, if permitted to remain at liberty, rights of persons and property would be jeopardized, and that Mrs. Geare was a fit subject for treatment, because of her mental condition. The petition contained only the opinion of the appellee in the latter regard. It was one thing to have before the court and jury an admission by the appellee that in her opinion Mrs. Geare was of unsound mind at a time near the execution of her will and deed, but it would have been quite another thing to have had before the court and jury her admission that two competent physicians, one of whom was her attending physician, had expressed the opinion that Mrs. Geare was of unsound mind.

The trial judge did not exclude the affidavits of the doctors on the ground that they "would have added nothing to the record as admissions by Mrs. Hodson against her interest—". He excluded them on the ground that they were not admissions by Mrs. Hodson against her interest. (Appellants' App. 23). This is the point presented by this appeal, and this court has not considered or decided it.

The affidavits of the doctors, especially that of Dr. Campbell, would not have been merely cumulative but would have been additive evidence, not only because they stated more than the petition stated but also because they contained statements and opinions of competent physicians, whose statements the appellee had adopted. Statements and opinions of competent physicians admitted by Mrs. Hodson, might have had more weight with the jury than her own statements and opinion. How can anyone conclude from the record that these additional admissions by the appellee by reference and adoption would not have led the jury to a different verdict concerning Mrs. Geare's testamentary capacity? Both the substance and source of these additional admissions by the appellee might well have carried more weight with the jury than the petition

itself. The lunacy statute gives recognition to this contention by providing that the petition itself is insufficient for any action by the District Court and must be accompanied by two (2) supporting affidavits of competent witnesses before the District Court can take any action.

2. This court did not decide the question presented by this appeal (Appellants' App. 10 and 19, and Appellants' Supplemental App. 2-4) that the District Court erred in excluding the hospital record of statements made by the testatrix herself at the hospital as follows:

> "* * * she was taken from her home, where she lived alone, and brought here. Does not know why. She doesn't realize she is sick. She states she has been working in a store. She knew her husband died 30 years ago. She has no children, but some nieces and nephews. She is quite cooperative, pleasant, answers questions readily. At times she is incoherent. Shows gross memory defects, and is disoriented." (Appellants' Supplemental App. 4)

The opinion of this court is entirely silent concerning this question to which the court's attention was specifically called in the oral argument when counsel for appellant explained the reason for Appellants' Supplemental Appendix. A determination of the admissibility of the hospital record of these statements by the testatrix herself involves entirely different considerations than the admissibility of the hospital record of the statements made to a hospital doctor by the appellee. This court's opinion ignored this vital question involving reliable evidence made by a disinterested person in the ordinary course of the hospital's affairs and business. In new York Life Ins. Co. v. Taylor, 79 U.S. App. D.C. 66, 69-70, 147 F.2d 297, this court said:

> "* * * The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation.'[9] * * *"

[9] Id., 318 U.S. page 114, 63 S. Ct. page 480, 87 L. Ed. 645, 14 A.L.R. 719."

This evidence is the very kind of evidence that the Federal Shopbook Rule made admissible. Its exclusion was erroneous. Its exclusion was prejudicial. How can anyone conclude from the record that the jury would not have reached a different verdict, if the jury had learned from this reliable source of evidence that at a time near the making of the will and deed, Mrs. Geare did not know that she had been taken from Emergency Hospital, and not from her home, to Saint Elizabeth's Hospital, did not know that she lived with many people and not alone, did not know why she was taken to Saint Elizabeth's Hospital, did not realize she was sick, thought that she had been working in a store when as a matter of fact she had worked for the Federal Government and had been retired on account of her illness?

3. It is not factually correct for this court to state that an effort could have been *but was not made* to elicit testimony from Mrs. Hodson on the matters recited in her statements appearing on the hospital record. The fact of the matter is that an effort was made to elicit testimony from her on the matters recited in the hospital record of her statements, and her answers were, "I don't remember" or "I told you I don't remember." (Appellants' App. 31-32)

A witness cannot be contradicted for the purpose of impeachment or any other purpose where the witness has made no assertion on either direct or cross-examination. No contradiction can be involved where there has been no assertion. See III Wigmore on Evidence, Third Edition, Section 1038, pages 723-724.

This court's opinion places counsel for the appellants in a false light. It indicates that through ignorance or neglect, counsel for appellants failed to do something that could have been done, when the truth of the matter is, as shown above, counsel actually did what this court states "could have been" done; namely, an effort to elicit testi-

mony from Mrs. Hodson on the matters recited in the hospital record of her statements. This court's further statement that "if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor" also implies that Mrs. Hodson was not interrogated on her statements shown on the hospital record, when the truth of the matter is that she was interrogated but gave no testimony inconsistent with her former statements. When counsel for appellants attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred:

> "The Court. If she says she does not remember, then she can neither affirm nor deny." (Appellants' App. 31)

Counsel for appellants offered the hospital record of Mrs. Hodson's statements as evidence of facts admissible under the Federal Shopbook Rule and the decision of this court in *New York Life Ins. Co.* v. *Taylor, supra.* The hospital record was admissible generally for the purpose of proving testamentary incapacity, even if not admissible to impeach Mrs. Hodson. (Appellants' App. 28-30, and 35) This point is presented by this appeal, and this court has not considered or decided it.

With respect to the hospital record of Mrs. Hodson's statements, the trial judge recognized the existence of a substantial question concerning admissibility. The following occurred in the trial court:

> "The Court. Tell me what your objection is.
>
> Mr. Raysor. My objection is, this is offering the document itself.
>
> The Court. Yes, I know; but what is the basis of your objection?
>
> Mr. Raysor. It is hearsay. If isn't sworn. There are no witnesses available. It is not the best evidence.

The Court. Oh no; that is not a good ground. I presume Mr. Hilland is offering it on the basis that it is a record kept in due course of business, under the Federal Shopbook Rules.

Mr. Raysor. Yes. I have examined those authorities at length and, as I understand the rule, it is that matters of opinion, merely routine statements and dates, and things of that sort, are admissible.

Mr. Hilland. That is all I am offering.

The Court. I am going to sustain the objection. You know, there are divergent rulings in different circuits on the Federal Shopbook Rule. The Second Circuit has a much more liberal interpretation of the Federal Shopbook Rule than this circuit has. I think in the Second Circuit this would be admissible. But in New York Life Insurance Company versus Taylor, and in a subsequent case of United States against Clainos, our Court of Appeals has limited the Federal Shopbook Rule to routine clerical entries. A statement of what somebody tells the person who keeps the record, except for purely routine facts, is not, in my judgment, within the Court of Appeals opinions.

Mr. Hilland. I thought, Your Honor, it was within the New York Life Insurance Company case.

The Court. I don't think it is now. For instance, what is within the New York Life Insurance Company versus Taylor case would be entries showing date of admission, temperature, pulse, blood pressure, or symtoms like the patient seemed dazed or incoherent; but anything beyond that would not be a routine clerical entry. If somebody accompanying the patient said the patient had been ill for so many days, I wouldn't think that would be routine.

Mr. Hilland. Isn't this admissible as an admission against interest by this witness? What I am offering here is what she told.

The Court. That is why I say you have a right to ask her 'Did you say so and so?' 'Did you say so and so?' And if she denies she did, you have a right to show it to her and ask her if this doesn't refresh your recollection. If she say no, you have a right to

subpoena the person who made this record and ask that person whether she made these statements.

But this is not a document that proves itself as a document made in due course of business, because of the Clainos interpretation of the Federal Shopbook Rule by our Court of Appeals. And you know the Supreme Court of the United States, in Palmer versus Hoffman, put a rather narrow interpretation on the Federal Shopbook Rule. That case involved a railroad accident and the plaintiff sought to place in evidence reports of the employees of the railroad company, from the company's files. Justice Douglas, I think it was, said those were not records kept in the due course of business, because the business of the company is to run a railroad, he said, and not to litigate.

I am going to sustain the objection. But you are free to proceed along the line I have indicated." (Appellants' App. 29-31)

Counsel for appellants then made an effort to elicit testimony from Mrs. Hodson on the matters recited in the hospital record of her statements. The result of that examination was as hereinbefore shown.

4. The foregoing points numbered 1, 2 and 3, show that it is necessary for this court to decide the questions involving (a) the exclusion of the two doctors' affidavits, particularly the affidavit of Dr. Neil P. Campbell, and (b) the exclusion of the hospital records relating to (1) the statements of the testatrix herself and (2) the statements of the defendant-appellee Hodson. Rule 61 of the Federal Rules of Civil Procedure has no application to a correct statement of the facts of this case. The supposed factual foundation upon which this court applied that rule and found it unnecessary to decide these questions of exclusion of evidence, is without support in the record.

5. The record shows that in Case No. 13,202, the trial judge's handling of the jury and his supplemental instructions to the jury on numerous occasions after the

case had been submitted to the jury did adversely affect the substantial rights of the appellants.

Obviously the verdict was not the result of the jury's deliberations. It was returned only three minutes after the court instructed the jury the last time to return to the jury room. That much time is required for a jury to file out of the jury box and into the jury room and out of the jury room and back into the jury box. (Appellants' App. 47)

Consider what had transpired immediately preceding those three minutes. The jury was given the Allen Charge in full, and more, emphatically, for the third time. (Appellants' App. 44-45) Then the jury was told that "a decision has to be reached by a jury, and you are that jury." (Appellants' App. 45) Then the jury was given some more of the Allen Charge again. (Appellants' App. 45) Then the trial judge inquired, "Now, is there anything else that *any member* of the jury would like to ask the Court?" Thereupon the foreman of the jury undertook to high pressure one juror by informing the trial judge that "one member of our panel would like to ask a question." One of the "lady jurors" indicated that she did not wish to ask a question, and the foreman had to admit that he was mistaken. But he succeeded in singling out that juror, to her embarrassment. (Appellants' App. 45-46) The lady juror, Juror Number 8, previously had indicated to the court that she lacked confidence in Mrs. Hodson's credibility. (Appellants' App. 37-38) In response to that point made by her, she had been instructed, among other things:

> "Confine your thinking and your consideration to the two questions that you have to decide, and don't go off on tangents on other matters. Just confine yourself to these questions. And in order to concentrate your mind on them, I'm going to read them again. Issue No. 2:" (Appellants' App. 38)

Then the trial judge read the two issues. After reading the two issues and telling the jury the form their answer should take, the trial judge again said, "And concentrate on that and don't give any thought to any extraneous matters." Later he said again, "And again concentrate on that specific question and do not consider any extraneous matters." Then he said, "Have I answered your question?" And Juror No. 8 said "I think so." (Appellants' App. 39)

From all that transpired on that occasion, Juror No. 8 and other jurors, could have concluded that what the judge said was tantamount to telling Juror No. 8 to consider Mrs. Hodson's perjury an extraneous matter. (Appellants' App. 37-39)

What Juror No. 8 wished to be informed about was the legal effect of Mrs. Hodson's perjury in the lunacy petition. What the trial judge said in response to that question, could have led Juror No. 8 and other jurors to conclude that Mrs. Hodson's perjury in the lunacy proceeding was an extraneous matter. See *Blunt* v. *United States*, Cases Nos. 13,294-5-6, in this court, decided April 18, 1957.

The trial judge refused to accept the report of the jury that it appeared to be a hung jury and that all members affirmed their decisions on Issues No. 2 and 3. The trial judge said, "Well, I am quite sure this is not a hung jury. I am not going to accept this statement, ladies and gentlemen of the jury. This trial took about three or four days. It cost the taxpayers a considerable amount of money. In fact, it has taken parts of five days, and the case should be decided." He said more and then gave the Allen Charge in full and more, emphatically. He told the jury "I see no reason why you should not promptly reach a verdict." (Appellants' App. 39-41) Immediately after all this transpired he allowed the jury to deliberate only three quarters of an hour and then on his own motion, had the jury brought into the courtroom and asked the foreman to "in-

form the Court what progress you are making towards arriving at a verdict. Are you likely to have a verdict very shortly?" It was only 3:45 p.m., and, after deciding that he would release the jurors until the next morning, he gave the Allen Charge again, fully and emphatically. In fact, as on other occasions, he gave the jury more than the approved Allen Charge. (Appellants' Brief 25-31) On that day, November 2, 1955, in a period of fifty-five minutes between 2:55 p.m. and 3:50 p.m., the jury was given the Allen Charge and more, fully and emphatically, twice. (Appellants' App. 39-43)

When the jury returned to the courtroom on November 3, 1955, at 2:45 p.m., the jurors had been deliberating for parts of 3 days or a total of 14 hours. The trial judge previously had refused to accept its report that it was a hung jury. By that time the majority was high pressuring the minority. The court received a note from the foreman reading as follows:

> "We, the jurors, request that we be reinstructed regarding our responsibilities to get together on a unanimous verdict." (Appellants' App. 44)

It was also on this same occasion that the foreman was high pressuring one juror by singling her out as a juror who wished to ask a question, and then admitted he was mistaken. (Appellants' App. 44-46) The trial judge said he had "a feeling that there must be one, two or three jurors that are standing out against the balance." (Appellants' App. 47) His handling of the jury and his supplemental instructions to the jury certainly indicate that he felt that way and that he was determined to force the minority to yield to the majority. In fact, upon the request of counsel for the appellants, the trial judge refused to tell the jurors that no individual juror need give up his own convictions. (Appellants' App. 46) He succeeded in forcing the minority to yield, after indicating that the jurors must reach a verdict, and that he was not going to

accept a hung-jury report and was not going to discharge them until they reached a unanimous verdict.

In *Stewart* v. *United States*, 300 F. 769, 785, Judge Sanborn said for the court:

"(13) The second question presented by the exceptions now under consideration here is: Was the supplemental charge and the reading of the excerpt from the opinion of the Supreme Court in Allen v. United States error? The excerpt from that opinion was not any part of the charge to the jury in that case, nor did the Supreme Court recommend that excerpt as a fit charge to the jury under such circumstances as existed in that case or in this. The supplemental charge to the jury under like circumstances in Allen's Case was 'taken literally from a charge in a criminal case which was approved of by the Supreme Judicial Court of Massachusetts in Commonwealth v. Tuey, 8 Cush. 1, and by the Supreme Court of Connecticut in State v. Smith, 49 Connecticut, 376, 386.' 164 U. S. 501 (17 Sup. Ct. 157). It was in substance the same charge which, under like circumstances, was given to the jury in United States v. Allis (C. C.) 73 Fed. 165, 182, which was sustained by the Supreme Court in Allis v. United States, 155 U.S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91, and which received the approval of this court as stating 'the proper limitation of the authority of a trial court when a jury is having difficulty in reaching a verdict,' in St. Louis & S. F. R. Co. v. Bishard, 147 Fed. 496, 500, 78 C. C. A. 62. If the court below had given that charge, it would have avoided the question now under consideration. That charge contained these statements:

'The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor,

and with a proper regard and deference to the opinions of each other.'

"Compare these statements with those relating to the right and duty of each individual juror to render a verdict according to his own conscientious convictions with these on this subject in the supplemental charge and in the excerpt read to the jury below, 'Of course, you are to understand that the court desires in no wise to influence you at all in respect to a verdict but simply to emphasize the fact that if you can consistently and by consultation with each other reach a verdict, * * * and if a verdict can be conscientiously arrived at, it is highly desirable,' and in the excerpt from the opinion of the Supreme Court in the Allen Case, which was read to the jury by the court below, and which it told them was addressed to their judgment and conscience, and then directed them to retire and make an earnest effort to see if they could agree in the case, to wit:

'While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.'

"This paragraph of the opinion in Allen's Case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and approved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror

to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself. The legal presumption was and is that each juror had listened deferentially to and considered the arguments of those who differed with him, and thereafter had conscientiously formed and expressed his honest conviction and judgment upon the issues submitted to them, and, while the excerpt from the opinion in Allen's Case was a proper and persuasive argument for the standard and approved charge under such circumstances, it so slightingly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that we are unable to resist the conviction that it tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority. As was said by Judge Hook of the charge in St. Louis & S. F. R. Co. v. Bishard, 147 Fed. 502, 78 C. C. A. 62, the charge itself was not sufficiently guarded; its tendency was to bring the minority to an agreement with the others, even against the dictates of their own judgment.

"The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial; the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned

with a verdict of guilty. As was said by the Supreme Court in Burton's Case, 'A slight thing may have turned the balance against the accused under the circumstances shown by the record' (196 U. S. 307 (25 Sup. Ct. 250)), the supplemental charge and especially the excerpt from the opinion in Allen's Case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial on this case."

Respectfully submitted,

ARTHUR J. HILLAND
PAUL M. NIEBELL
Attorneys for Appellants

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ARTHUR J. HILLAND
PAUL M. NIEBELL
Attorneys for Appellants